

1       equally allocates the common space on a pole.

2               Long Island also has, you know, adopted a  
3       rate that in fact interestingly uses replacement cost  
4       as its basis for calculating an appropriate rate.

5               So what I found was that there are other  
6       more local jurisdictions that are taking different  
7       approaches to what we have seen at the FCC  
8       historically.

9               Q       Did you see anything, in doing your  
10      research, any states or industry groups that did  
11      something differently with the 30 inches of safety  
12      space on the pole?

13              A       Yeah. As a matter of fact, the state of  
14      Indiana, I think, very explicitly said that they think  
15      it's appropriate to allocate 40 inches of  
16      communications worker safety zone, if that's the  
17      correct term, equally. They propose to equally  
18      apportion that among attachers.

19              Q       And how did the review --

20                      JUDGE SIPPEL: Can I ask you, can you give  
21      me a proffer of relevance on this? I mean what do we  
22      care what they're doing in states? That's a state

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1 legislative decision.

2 MR. ESTES: Your Honor, all of this goes  
3 into the opinions that Mr. Spain forms, and I believe  
4 on cross there was some -- maybe at least an  
5 insinuation that Mr. Spain might be the only person  
6 that has any issues. And all I'm doing is  
7 establishing through Mr. Spain what he looked at in  
8 forming his opinions in the case. I think the  
9 questions are over and so we would move on.

10 JUDGE SIPPEL: Well, I still have a -- my  
11 question is still what is the relevance? I mean if he  
12 looked at it, that's fine. If he looked at the phone  
13 book, that's fine. But my question is what is the  
14 relevance of what state and municipalities have  
15 determined that they should charge -- I take it that's  
16 with respect to attachment rates. Is that what we're  
17 talking about?

18 MR. ESTES: I believe it is, Your Honor,  
19 and Mr. Spain certainly uses it in his opinions and it  
20 is also certainly a justification for any departure  
21 that might need to be made from the FCC cable rate.

22 JUDGE SIPPEL: Is there an attachment rate

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1 that states and localities are imposing over and above  
2 what the FCC charges?

3 THE WITNESS: I think so, yes, sir. Based  
4 on the methodologies I've described in these other  
5 methods, it would yield a higher rate than the FCC  
6 rate.

7 JUDGE SIPPEL: So a cable company would  
8 have to pay on a pole basis not only whatever the FCC  
9 prescribes, but also as prescribed maybe by state and  
10 maybe a municipality?

11 THE WITNESS: I understand that these  
12 calculations were -- and these methodologies would  
13 supersede the FCC methodology in these local  
14 jurisdictions where a state assumes jurisdiction over  
15 the matter. And don't let me practice law -- I  
16 apologize -- but I understand that to be the case.

17 JUDGE SIPPEL: There's a lot of  
18 legislators that don't practice law.

19 (Laughter.)

20 JUDGE SIPPEL: This is your understanding  
21 of how it works?

22 THE WITNESS: Yes, sir.

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1 JUDGE SIPPEL: All right. Go ahead, Mr.  
2 Estes.

3 BY MR. ESTES:

4 Q Yesterday, Mr. Spain, you were asked about  
5 the work that you have done for utilities and your  
6 experience as a CPA and as a CVA. Have you also done  
7 work for a cable company?

8 A I have.

9 Q Can you tell us about that?

10 A Yeah, I worked on a project for a cable  
11 company that's also a CLEC and it offers telephone,  
12 Internet, and cable, and it was considering expanding  
13 into other markets in the Southeast, and a brief  
14 description --

15 MR. COOK: Is there any relevance, Your  
16 Honor, to this last question?

17 MR. ESTES: I think it is certainly  
18 relevant to his experience which, if the implication  
19 is made that he has worked for nothing but utilities,  
20 that is not the case. He has worked for a cable  
21 company.

22 JUDGE SIPPEL: I'll permit it on redirect.

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1 You were pretty broad in terms of what you covered,  
2 Mr. Cook, so it's going to be hard to slice this  
3 cheese too thin.

4 Go ahead.

5 THE WITNESS: We were -- I was part of a  
6 team that was asked to assist or calculate for --  
7 build a model for, actually, a cable company, Internet  
8 company and CLEC company all bundled into one. They  
9 wanted to expand into different markets, and were  
10 considering both expansion issues and funding issues,  
11 whether or not to issue, you know, debt or issue -- or  
12 go public and issue stock. And I was part of a  
13 consulting team that went in and built a model for  
14 them to make those decisions.

15 BY MR. ESTES:

16 Q Yesterday you were asked about some FCC  
17 and Federal court decisions from four, five, six years  
18 ago. As a valuation expert and analyst, are you  
19 required to do your own research when formulating your  
20 opinions?

21 MR. COOK: Objection; leading. I think  
22 the question should be what are you required to do.

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1 MR. ESTES: But it's really just a -- it's  
2 just a background question for his qualifications.

3 JUDGE SIPPEL: I'll permit it. Overrule  
4 the objection.

5 THE WITNESS: I am required to -- expected  
6 to and required to do independent research, certainly,  
7 in an engagement of this type, and feel that I have  
8 done that.

9 BY MR. ESTES:

10 Q You did that in this case?

11 A I feel I did, yes. I did do that.

12 Q Would you be doing your job if you took  
13 what someone else decided or wrote five, six years ago  
14 on a topic that you have been asked to evaluate and  
15 you took what they said and did not do any of your own  
16 research?

17 MR. COOK: Objection; leading.

18 JUDGE SIPPEL: All right, I'll sustain the  
19 objection this time, but I know what you're asking,  
20 Mr. Estes, and you want to ask it as have you ever  
21 relied upon in the context of your work -- you know,  
22 the work product of others in connection with, you

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1 know, what you did. Something along those lines. Got  
2 it?

3 MR. ESTES: I'll see if I can say that as  
4 well as Your Honor did.

5 BY MR. ESTES:

6 Q Mr. Spain, in your work as a valuation  
7 analyst, have you ever relied solely upon someone  
8 else's research from five or six years ago when you  
9 have been asked to determine an issue today?

10 A I don't recall ever relying solely on  
11 anyone's research. Certainly, you know, there have  
12 been cases where I have relied on others, but I don't  
13 recall -- certainly not taking anything blindly and  
14 solely relying on it, and I try to always and I feel  
15 I do always do my own independent analysis and  
16 research in reaching my conclusions.

17 Q You were asked this morning about some  
18 negotiations between cable companies and pole owners,  
19 but I believe it was -- I'm not sure you got a fair  
20 chance to respond, so I'm going to ask you the  
21 question. Are you aware or have you seen any evidence  
22 in negotiations between cable attachers, in particular

1 the complainants, and other utilities to pole  
2 attachments?

3 A Between complainants and other utilities?

4 Q Correct.

5 A Yes. As a matter of fact, I have seen the  
6 agreement between the complainants, or agreements  
7 between the complainants and CHELCO which was the  
8 referenced entity earlier, which is Choctawhatchee  
9 Electric Cooperative, and I understand that those were  
10 negotiated rates, and that they are in the range of  
11 \$15-20 on a sliding scale moving forward in time.

12 Q Okay. In doing your analysis and research  
13 in this case, did you gain an understanding of whether  
14 those contracts were negotiated under duress?

15 A I don't have first-hand knowledge of  
16 whether or not there was duress in those situations.

17 JUDGE SIPPEL: You know, the question  
18 should be asked something like what did you determine,  
19 if anything, with respect to duress, instead of  
20 getting into this leading area because I see Mr. Cook  
21 is raring to go.

22 Let's take a break. It's 10:30. Let me

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1 go off the record just a minute.

2 (Discussion off the record.)

3 JUDGE SIPPEL: Let's go back on the  
4 record. We are in recess until quarter of 11 by the  
5 clock in the back of the room. Thank you.

6 You're not to talk to anybody. You are  
7 not to talk to counsel about your testimony.

8 THE WITNESS: Yes, sir.

9 JUDGE SIPPEL: Thank you.

10 (Recess.)

11 JUDGE SIPPEL: Okay, we are back on the  
12 record. Okay, Mr. Spain, you are still under oath and  
13 you are still on the stand.

14 THE WITNESS: Yes, sir.

15 MR. COOK: We're missing an ingredient.

16 JUDGE SIPPEL: We're missing Mr. Estes.  
17 Okay. That's all right. Let's go off the record till  
18 he gets in. That's okay.

19 (Discussion off the record.)

20 JUDGE SIPPEL: We are back on the record.  
21 Okay, Mr. Estes, you may continue with your  
22 examination, sir.

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1 MR. ESTES: Thank you, Your Honor.

2 BY MR. ESTES:

3 Q Mr. Spain, a couple more questions. I  
4 believe you were asked yesterday or possibly this  
5 morning, I forget, about cherry-picking, that you were  
6 not given an opportunity to explain what you mean by  
7 that and how it figured into the analysis. Can you  
8 share that with the Court?

9 A Yeah, absolutely. And then I wrote this  
10 in my report and I think it's referenced in my direct  
11 testimony as well. The concept of cherry-picking is  
12 simply that, you know, where in this case, where an  
13 attacher would choose to attach to the more attractive  
14 poles within, you know, an existing pole owner's  
15 territory. So the idea is that -- and that's  
16 supported, actually, by the testimony of at least one  
17 of -- and I'd have to refer to my prefiled written  
18 direct, but it's referred to in the testimony of the  
19 complainants' representatives that they choose to  
20 attach to the better poles or the better areas within  
21 Gulf Power's territory. And there may be a higher  
22 value associated with those poles to which they choose

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1 to attach versus those poles which they don't choose  
2 to attach, and then to carry this further, therefore,  
3 the use of average cost would be conservation, in my  
4 estimation, because it doesn't take into account this  
5 higher value of the poles to which the complainants  
6 are attaching.

7 Q From your research, do you have an  
8 understanding of what the complainants do in the other  
9 areas where they don't choose to attach to Gulf  
10 Power's pole?

11 A You know, I guess they either don't offer  
12 cable services or they go underground. Or they  
13 reroute around those areas.

14 Q You were asked this morning about a  
15 document that admittedly you said you had never seen,  
16 Complainant's Exhibit 77. If we could pull that up.  
17 And now just in the interest of completeness, I would  
18 like to ask you about a couple other pages that were  
19 part of this exhibit.

20 First of all --

21 JUDGE SIPPEL: This is the Adelphia  
22 letter?

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1 MR. ESTES: We are probably going to -- I  
2 think we can possibly read it.

3 THE WITNESS: I can read that.

4 BY MR. ESTES:

5 Q If you can read that, Mr. Spain, if you  
6 would just tell me if you see anything in this letter  
7 -- and let's look at the second page of the letter  
8 here in a second -- that says anything about rates?

9 MR. COOK: Objection. I believe the  
10 witness testified that he had not seen this, and I  
11 used this as a basis for asking him had he seen  
12 anything like what the cable attacher had written in  
13 this letter, or the telecom attacher.

14 JUDGE SIPPEL: That's correct, isn't it,  
15 Mr. Spain, you had not seen this letter before?

16 THE WITNESS: That's right, yes, sir.

17 MR. ESTES: Your Honor, in the interest of  
18 completeness under rule 1006, I believe the entire  
19 exhibit is open for redirect, and frankly, Your Honor,  
20 if Mr. Cook is going to ask my witness about one slice  
21 of the pie, we need to talk about the whole pie and  
22 just one little part that he chose to talk about.

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1 Redirect is to have the complete picture, and if he  
2 asked Mr. Spain about this document, it is ripe for  
3 questioning on redirect.

4 JUDGE SIPPEL: Not if he hasn't seen it  
5 before.

6 MR. COOK: Exactly.

7 JUDGE SIPPEL: I will sustain the  
8 objection.

9 MR. ESTES: Your Honor, can I move to  
10 strike portions of Mr. Cook's cross-examination  
11 relating to the document that Mr. Spain had not seen?

12 MR. COOK: Objection.

13 MR. ESTES: What I'm saying now is that  
14 Mr. Cook just articulated --

15 JUDGE SIPPEL: All right. Mr. Estes, the  
16 party conducting the cross-examination and the counsel  
17 conducting cross-examination, is given a certain  
18 amount of leeway because it's cross-examination. When  
19 he crosses the threshold, he gets stopped, and that's  
20 exactly what I did. So there's no purpose to go with  
21 anything further on this particular document that the  
22 witness has not seen.

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1 MR. ESTES: I take it the motion to strike  
2 is overruled, Your Honor?

3 JUDGE SIPPEL: Yes, sir. It is overruled.

4 BY MR. ESTES:

5 Q Mr. Spain, yesterday you were asked some  
6 questions about a lost opportunity and whether you  
7 have seen anything along those lines, and it's another  
8 instance where I don't know that you were able to give  
9 your complete answer. Can you tell us what your  
10 research has found?

11 A Yeah. Regarding lost opportunity, there  
12 appears to me to be lost opportunity by virtue of the  
13 fact that if we can accept that there are transactions  
14 that may establish a market value, and by virtue of  
15 the fact that the Gulf Power, for example, must charge  
16 a rate that is below that under the provisions of 224,  
17 then the difference between those is in and of itself  
18 an opportunity cost sustained by Gulf Power as it  
19 relates to its poles.

20 Q Anything else you would like to add?

21 A Not if that makes sense to everyone.

22 Q Makes sense to me.

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1           A     Okay.

2           Q     One final thing, Mr. Spain. On several  
3 occasions yesterday and today, Mr. Cook asked you  
4 about some parts of your deposition, but the one part  
5 I want to focus on is what he read back to you four or  
6 five times, which is on page 85 of your deposition.  
7 And Mr. Cook showed you the deposition transcript, and  
8 said that you had said at deposition that you had not  
9 done an independent analysis or calculation. Can you  
10 explain to the Court what you mean when you said that  
11 in deposition?

12          A     Yeah. Thank you. Because --

13               JUDGE SIPPEL: Can you refer me to that?

14               THE WITNESS: Yes, Your Honor.

15               JUDGE SIPPEL: To the page and line?

16               MR. ESTES: Your Honor, it's on page 85.

17               JUDGE SIPPEL: Deposition page?

18               MR. ESTES: Deposition page 85, and the  
19 question begins at line 8 and the answer goes through  
20 line 16.

21               THE WITNESS: My response was I'm not  
22 rendering an independent analysis or calculation, and

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1 in that I meant for analysis and calculation to be  
2 synonymous. I certainly did what I consider to be  
3 extensive independent analysis. I did not do a  
4 separate calculation.

5 So if my answer was unclear, I apologize,  
6 but I -- what I mean by that is that I did not do an  
7 independent or separate calculation apart from what  
8 Gulf Power did.

9 BY MR. ESTES:

10 Q Mr. Spain, did you do a full and complete  
11 analysis in this case to the extent you are  
12 comfortable offering the opinions that you have  
13 provided to the Court in this matter?

14 MR. COOK: Objection; leading on that full  
15 and complete.

16 MR. ESTES: It's the last one.

17 JUDGE SIPPEL: Well, it's a conclusion.  
18 It's -- he's -- in effect he's asking the witness to  
19 render an opinion on his opinion, and I -- you know,  
20 it's -- you got a good rate argument, but I'm going to  
21 permit the question.

22 THE WITNESS: Yes, I think that the work

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1 I did is sufficient and allows me to reach the  
2 conclusions and opinions that I have reached, and I am  
3 comfortable with what I have done.

4 BY MR. ESTES:

5 Q Regarding those opinions and conclusions,  
6 did you have access to all documents and information  
7 that you needed?

8 A I would say in a general sense yes. If  
9 more work were to be done to try to substantiate the  
10 use of say the sales comparison method, then there may  
11 be more information I could look at, but to this  
12 point, given the availability of information,  
13 certainly I have looked at everything available to me  
14 and I am very comfortable with what I have looked at  
15 and the conclusions and opinions that I have reached.

16 Q Do you stand by those opinions and  
17 conclusions?

18 A I do.

19 MR. ESTES: Thank you, Your Honor.  
20 Nothing further.

21 JUDGE SIPPEL: Any recross on just this  
22 area that he's gone into?

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1 MR. COOK: Yes, Your Honor, exactly right,  
2 just a half dozen questions, Your Honor.

3 RECROSS EXAMINATION

4 BY MR. COOK:

5 Q Mr. Spain, you were asked by Mr. Estes  
6 about the option to go underground. A cable  
7 attacher's option to go underground, to the extent it  
8 exists, does not have any impact on Ms. Davis's  
9 replacement cost calculations for attachment to Gulf's  
10 poles; right?

11 A Does their option to go underground impact  
12 Ms. Davis's calculation?

13 Q Does Ms. Davis's calculations -- did they  
14 have or -- did they -- let me rephrase.

15 A cable attacher's option to go  
16 underground has no impact on Ms. Davis's replacement  
17 cost calculations; right?

18 A I think Ms. Davis's calculations are  
19 independent of the options available to the cable  
20 attachers.

21 Q So if a cable attacher has an option to go  
22 underground for a pole or a given line of poles, that

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1 doesn't impact Gulf's costs; right?

2 A I think that's the case. Yeah, that's  
3 correct.

4 Q Okay. And I believe you were asked with  
5 ILECs. You didn't talk to ILEC pole owners for your  
6 research, did you?

7 A No, I did not.

8 Q Okay. And rates paid to another pole  
9 owner do not help us understand what costs Gulf incurs  
10 as a result of hosting complainants' cable operator  
11 attachments; right?

12 A In terms of opportunity costs, it is a  
13 factor and it is beneficial information.

14 Q But something that our four cable operator  
15 complainants pay in this case to somebody else, that  
16 doesn't help us determine or measure what costs Gulf  
17 actually incurs from complainants' attachments; right?

18 A It helps in measuring opportunity costs.

19 Q But not in measuring their actual  
20 incremental or marginal costs caused by complainants'  
21 attachments; right?

22 A And it depends on how you want to define

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1       that.  If you're going to define that as looking at  
2       checks written by Gulf Power, then I will accept your  
3       characterization.  However, I want to be clear that it  
4       is beneficial in ascertaining an opportunity cost.

5               Q       Now the replacement cost methodology that  
6       you espouse in this case does not have anything to do  
7       with the actual marginal costs that Gulf incurs today  
8       for hosting the complainants' cable operator  
9       attachments?

10              A       I'm sorry, when you paused I lost the  
11       beginning of the question.

12              Q       Okay.  The replacement cost methodology  
13       that you espoused today does not have anything to do  
14       with the actual marginal costs that Gulf incurs today  
15       that are caused by complainants' cable operator  
16       attachments; right?

17              A       I don't think that's true, and for one  
18       thing, there are probably different -- there are  
19       different methodologies available to calculate  
20       marginal costs, and one could argue that the  
21       replacement cost is a method for calculating marginal  
22       cost.

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1           Q       You're not familiar with the Supreme  
2 Court's ruling in 1987 where it says marginal costs in  
3 the context of pole attachments equal the minimum  
4 measure under the FCC formula, are you?

5           A       I may have read that in some of the legal  
6 opinions that I have read.

7           Q       Okay. And I believe you testified in this  
8 case that you have no idea what Gulf's margin costs of  
9 complainants' pole attachments are; right?

10          A       I didn't make the calculation as to what  
11 its marginal costs were.

12          Q       Okay.

13                 MR. COOK: No further questions, Your  
14 Honor.

15                 JUDGE SIPPEL: Anything further? Are we  
16 finished?

17                 MR. ESTES: No, Your Honor.

18                 JUDGE SIPPEL: Ms. Lien?

19                 MS. LIEN: No, Your Honor.

20                 JUDGE SIPPEL: Nothing from me, either.  
21 Mr. Spain, you are excused as a witness. Thank you  
22 very much.

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1 THE WITNESS: Thank you, Your Honor.

2 (Witness excused.)

3 JUDGE SIPPEL: Let's go off the record a  
4 minute.

5 (Discussion off the record.)

6 JUDGE SIPPEL: We are back on the record.  
7 No witness in the witness chair. Mr. Campbell, you  
8 have some preliminary matters, some additional  
9 administrative matters that you want to take care of?

10 MR. CAMPBELL: We do, Your Honor. First  
11 and foremost, we would like to move into evidence the  
12 remaining Gulf Power exhibits that have been  
13 identified to date, and those would be Gulf Power  
14 Exhibit 66 through 70, and they are the deposition  
15 designations of complainants Bruce Burgess, Mark  
16 O'Cellaigh, Shayne Routh, and Mr. Jeff Smith.

17 I believe we also have in there deposition  
18 designations from Mr. Mickey Harrelson.

19 JUDGE SIPPEL: Let's see. I have a volume  
20 that was given to me yesterday, Gulf Power case in  
21 chief, and it starts with the testimony of Mr. Dunn,  
22 which has been received in evidence.

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1 MR. CAMPBELL: Yes, sir.

2 JUDGE SIPPEL: Mr. Bowen's has been  
3 received in evidence. The direct testimony of David  
4 Barker, that's not --

5 MR. CAMPBELL: That has been withdrawn  
6 pursuant to a stipulation between the parties.

7 JUDGE SIPPEL: The testimony of Kenneth  
8 McVeary?

9 MR. CAMPBELL: That has been withdrawn  
10 pursuant to a stipulation between the parties.

11 JUDGE SIPPEL: And the direct testimony of  
12 Harry Davis?

13 MR. CAMPBELL: That's in.

14 JUDGE SIPPEL: The direct testimony of Mr.  
15 Spain, that's in. Then I've got a Gulf Power  
16 Company's exhibit list. That doesn't apply. Or maybe  
17 it does apply.

18 MR. CAMPBELL: You recall, Your Honor,  
19 that at the conclusion of the document admission  
20 session, it was decided that we would take our  
21 deposition designations, mark them as documentary  
22 exhibits because they contain documentary exhibits

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1 within the text that was designated. We did that, and  
2 renumbered what was previously tendered as a  
3 testimonial exhibit as a documentary exhibit. Those  
4 are Exhibits 66 through 70 that we are now moving into  
5 evidence.

6 JUDGE SIPPEL: I'm just looking to see  
7 where -- I'm looking for the numbers on the exhibits  
8 in this notebook that's before me, and I don't see any  
9 exhibit numbers.

10 MR. CAMPBELL: I don't think it would be  
11 in that notebook any longer, Your Honor. Those are  
12 our case-in-chief filings. We have then reentered it.  
13 It would be in our exhibit notebook, the last volume.

14 JUDGE SIPPEL: All right.

15 JUDGE SIPPEL: Exhibits 66 through 70?

16 MR. CAMPBELL: Yes, Your Honor. And if  
17 they didn't make their way into the notebook --

18 JUDGE SIPPEL: I have it here.

19 MR. CAMPBELL: Okay.

20 JUDGE SIPPEL: Let me see what I have.  
21 Well, I take it that No. 66 is the deposition of Bruce  
22 Burgess?

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1 MR. CAMPBELL: That is correct.

2 JUDGE SIPPEL: Does the court reporter  
3 have what the court reporter needs on this to mark  
4 them?

5 THE REPORTER: No.

6 JUDGE SIPPEL: All right. Well, you can  
7 certainly get on your recording what it is that we are  
8 identifying, and you can note in the transcript that  
9 it's been received, and then we're going to have to do  
10 the mechanics at a later time.

11 MR. CAMPBELL: That would be fine, Your  
12 Honor.

13 JUDGE SIPPEL: That will be fine?

14 MR. CAMPBELL: We have Exhibit 66, 66-A  
15 and B, that we offer into evidence. They are the  
16 deposition excerpts of Bruce Burgess and two documents  
17 referred therein.

18 JUDGE SIPPEL: Okay. We'll identify that  
19 as Gulf Power Exhibit No. 66. Is there any objection  
20 to its receipt into evidence?

21 MR. SEIVER: No, Your Honor. We would  
22 just like the opportunity to cross-designate the

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